Supreme Court, U. S.
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NO. 77-1137

IN THE SUPREME COURT OF THE UNITED STATES
October, 1977 Term

CLARENCE NEVILLE,

Petitioner,

V.

THE HONORABLE SIMON L. FRIEDMAN, Judge of the Circuit Court of Sangamon County, Seventh Judicial Circuit of Illinois, **C. JOSEPH CAVANAGH,** State's Attorney for Sangamon County, Springfield, Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

CLARENCE NEVILLE
Petitioner pro se
Register No. 32106-138
U.S. Penitentiary
P.O. Box 33
Terre Haute, Ind. 47808

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Respondents.

The petitioner, Clarence Neville, respectfully prays hat a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois which denied a writ of prohibition, holding that the State of Illinois did not violate the provisions of Illinois Revised Statutes, 1973, ch. 38, par. 1003-8-9(a), Interstate Agreement on Detainers Act, 18 U.S.C. Appendix § 2, and could again properly acquire jurisdiction for trial under said statutes.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Appendix, hereinafter cited "App.," *infra*, p. 19), is reported at Ill. 2d , N.E. 2d (1977). The Memorandum of Opinion denying petitioner's motion to dismiss in the Circuit Court, Seventh Judicial Circuit (App., *infra*, p. 25), is not reported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered and filed on September 20, 1977 (App., *infr*, p. 19). The order extending the time to file a petition for writ of Certiorari was entered December 13, 1977, extending the time to and including February 18, 1978 (App., *infra*, p. 18). The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Can the mandatory dismissal required by said Agreement, upon return of a prisoner to his original place of imprisonment, without being tried by the receiving jurisdiction, be obviated, absent the petitioner's waiver of rights thereunder by a continuance of trial granted for good cause pursuant to Article IV(e) of said Agreement?

2. Does equal protection of the laws and due process under the Fourteenth Amendment apply to enforce procedural and statutory compulsion of the Interstate Agreement on Detainers to dismiss the charges where a disposition has not been reached, although a continuance had been granted for good cause, but where a criminal defendant does not consent to a return to the sending jurisdiction?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . .nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Interstate Agreement on Detainers Act, 18 U.S.C. Appendix § 2, Article IV(e) provides:

> "If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

28 U.S.C. § 2241 (c)(5) provides, in pertinent part:

> "The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (5) It is necessary to bring him into court to testify or for trial."

Illinois Revised Statutes, 1973, ch. 38, par. 1003-8-9(a) provides:

> "If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

STATEMENT OF THE CASE

The petitioner is presently a United States prisoner incarcerated at the United States Penitentiary in Terre Haute, Indiana. Indictments are presently outstanding against him in the Circuit Court for the Seventh Judicial Circuit of Illinois, Sangamon County, Springfield, Illinois, No. 74 CF 266, scheduled for the February, 1978 trial term.

Petitioner, pursuant to the provisions of Illinois Revised Statutes, Ch. 38, of the Interstate Agreement on Detainers Act, Title 18 U.S.C. Appendix, was transferred on June 7, 1976, from the United States Penitentiary in Terre Haute, Indiana, to the Sangamon County Jail in Springfield, Illinois pursuant to the Agreement, for purposes of trial in the Circuit Court for the Seventh Judicial Circuit of Illinois, Sangamon County, Springfield, Illinois. With a trial date set for October 25, 1976, counsel, on October 18, 1976, did request a continuance based upon his

unanticipated illness.[1] The motion (App., *infra*, p. 26), was heard by the trail court at which time the petitioner was not personally present (although still incarcerated in the Sangamon County Jail, adjacent to the Courthouse) and said continuance was granted until January, 1977, with a specific date to be set thereafter. As a result of his absence, petitioner was in no way advised or interrogated with regard to any effect said continuance would have upon his rights under the Agreement. Subsequent to said hearing, an order was promulgated by the trial court effectuating the retransfer of petitioner to the United States Penitentiary at Terre Haute, Indiana.[2]

A motion to dismiss[3] was subsequently filed based upon the provisions of Article IV(e) of the Agreement, mandating a dismissal with prejudice of the instant indictments as a result of the petitioner having been retransferred to Terre Haute without having been tried in Illinois.

Prior to a ruling on said motion to dismiss by the trial court, the Appellate Court of the Fourth District of the State of Illinois on February 3, 1977, decided the case of People v. Dye, 45 Ill. App. 3d 465, in which opinion that Court ruled on the interpretation of Article IV(e) based upon the facts in *Dye*. Accordingly, the Honorable Simon L. Friedman sent copies of the *Dye* opinion to all counsel of record inviting further pleadings commenting upon the effect thereof. Subsequent to said pleadings having been duly filed, Judge Friedman on February 23, 1977, promulgated a Memorandum of Opinion (App., *infra*, p. 25), denying said motion to dismiss, holding that *Dye* was controlling.

Following the order denying petitioner's motion to dismiss, counsel for petitioner moved to file a Writ of Prohibition in the Supreme Court of Illinois, said leave being granted and the petition being filed in April, 1977. By the Writ of Prohibition, counsel sought to preclude further prosecution on the outstanding indictments upon the ground that the receiving state did not complete the prosecution prior to returning the petitioner to the sending state, as required by Article IV(e) of the Agreement.

On September 20, 1977, the Supreme Court of Illinois, in a written opinion (App., *infra*, p. 19), denied prohibition on the grounds that *Dye* controlled, and that no prejudice had attached.

1 Petitioner did not learn of counsel's illness until October 25, 1976, the date petitioner was returned to the United States Penitentiary at Terre Haute, Indiana.

2 When petitioner was notifed he was being returned to federal custody on October 25, 1976, he requested the Sheriff of Sangamon County to call Circuit Judge Simon L. Friedman to rescind the order, as he had not been permitted any opportunity to contest the order of retransfer. The call was made, but the request was denied since the order had already been entered.

3 On December 27, 1976, the State of Illinois filed a Writ of Habeas Corpus Ad Prosequendum, demanding the production of the petitioner in the State of Illinois, pursuant to the "Agreement", to stand trial on the instant indictments. Petitioner sought a stay via Writ of Habeas Corpus (28 U.S.C. § 2241 et seq.) in the U.S. District Court for the Southern District of Indiana (Docket No. TH76-208-C) which precluded petitioner being released. The writ was denied for failure to exhaust available state remedies, 28 U.S.C. s2254, said order entered after the filing of the motion to dismiss in the Circuit Court, Seventh Judicial Circuit.

REASON FOR GRANTING THE WRIT

QUESTION PRESENTED

1. Can the mandatory dismissal required by said Agreement, upon return of a prisoner to his original place of imprisonment, without being tried by the receiving jurisdiction, be obviated, absent the petitioner's waiver of rights thereunder by a continuance of trial granted for good cause pursuant to Article IV(e) of said Agreement?

The Interstate Agreement on Detainers Act (hereinafter "Agreement") became a federal law in 1970 and is reproduced in Title 18 U.S.C. Appendix. Illinois joined the Agreement in 1971. Illinois Revised Statutes 1971, ch. 38, § 157-31. The Illinois act is now codified at Illinois Revised Statutes 1973, ch. 38, § 1003-8-9.

Article IV of the Agreement requires commencement of the trial of a prisoner against whom a state detainer has been lodged within 120 days of the arrival of the prisoner in

state custody pursuant to written request of the appropriate officer. Article IV also requires trial before the prisoner is returned to state custody.[4] The State of Illinois, pursuant to the Agreement, obtained custody of the petitioner on June 7, 1976, for disposition on the indictments pending in the Circuit Court, Seventh Judicial Circuit, Sangamon County, after they had filed a detainer with officials at the United States Penitentiary at Terre Haute, Indiana. While in state custody, a trial date of October 25, 1976, had been set by the trial court. The petitioner was to be maintained in the County Jail for Sangamon County to await trial on the instant indictments.

On October 18, 1976, unknown to petitioner, counsel for petitioner submitted a motion for continuance predicated upon an unanticipated illness which would require a minimum continuance of one month. Subsequent to the trial date, but again unknown to petitioner, the trial court promulgated an order directing the re-transfer of petitioner from state to federal custody, effectively foreclosing any rights under the Agreement petitioner might have, and diametrically foreclosing any opportunity for petitioner to be heard on the order of return.[5] The petitioner was returned to the sending jurisdiction on October 25, 1976 untried. The State of Illinois by returning the petitioner to

4 For purposes of the Agreement, the writ of habeas corpus Ad Prosequendum issued in this case by the State of Illinois on December 27, 1976, was a second request for custody of petitioner after once being returned to the sending state (federal government) with the charges untried, which was used to circumvent Article IV(e) of the Agreement. See, United States v. Mauro, 544 F. 2d 588 (2d Cir. 1976), cert. granted 22 Cr.L.Rptr. 4002 (October 5, 1977); cf. United States v. Ricketson, 498 F. 2d 367, 373 (5th Cir. 1974), cert. denied, 419 U.S. 965, 95 S.Ct. 227, 42 L.Ed. 2d 180 (1974).

5 Petitioner solicited the services of the Sangamon County Sheriff to vacate the order by either calling the court (which he did) or one of counsel. James Potter, Esquire, one of the attorneys for petitioner immediately called Judge Friedman to vacate the order, which request was denied. Gerald Alch, Esquire, could not be reached until after petitioner had been returned to the United States Penitentiary at Terre Haute, Indiana.

the United States Penitentiary at Terre Haute, Indiana did, in fact, by that action, violate the provisions of Article IV(e) of the Agreement, which states:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

The Agreement sets forth with specific particularity the rights and duties imposed upon both the "sending" and "demanding" jurisdiction relative to the disposition of the charges now pending against the petitioner in the demanding jurisdiction. The Agreement, in unequivocal language as a remedy set forth in Article IV(e) is that where a defendant is returned untried to the sending state, the remedy is dismissal with prejudice. *United States ex rel. Esola* v. *Groomes,* 520 F. 2d 830 (3d Cir. 1975); *United States* v. *Sorrell,* 413 F. Supp. 138 (E.D. Pa. 1976); cf. *United States* v. *Scallion,* 548 F. 2d 1168 (5th Cir. 1976); *Contra, United States* v. *Ricketson,* 498 F. 2d 367, 373 (7th Cir. 1974), cert. denied, 419 U.S. 965, 95 S.Ct. 227, 42 L.Ed. 2d 180 (1974). Thus, whenever the Agreement is available for securing the presence of a prisoner for the purpose of a criminal prosecution in another jurisdiction the Agreement is the exclusive means for doing so. *United States* v. *Ford,* 550 F. 2d 732 (2d Cir. 1977). The demanding state's use of a writ of habeas corpus Ad Prosequendum is constructed as a request under the Agreement, and to hold otherwise, is to circumvent and dilute the legislative intent and commitment of the Agreement. *Carbo* v. *United States,* 364 U.S. 611, 81 S.Ct. 338, 5 L.Ed. 2d 329 (1961).

The petitioner, in seeking to enforce the unequivocal provision of Article IV(e) of the Agreement, moved to dismiss the indictments in the Circuit Court. Subsequent to a ruling by the trial court, the Appellate Court of the Fourth District of the State of Illinois on February 3, 1977, decided the case of *People* v. *Dye,* 45 Ill. App. 3d 465, in which opinion that court ruled on the interpretation of Article IV(e) based upon the facts in *Dye.* Although the trial court solicited additional briefing by counsel on the effect of *Dye,*

the court on February 23, 1977, promulgated a Memorandum of Opinion holding that *Dye* controlled. Because the facts in *Dye* were diametrically the opposite of petitioner's case, a writ of prohibition was sought in the Supreme Court of Illinois, which, in a written opinion, on September 20, 1977 held that *Dye* controlled and that the provisions of Article IV(e) of the Agreement did not mandate dismissal of the indictments in petitioner's case.

The facts in *People* v. *Dye, supra,* are totally distinguishable from petitioner's case. *Dye* initiated a demand for speedy trial under the Agreement on September 18, 1974, and on January 2, 1975, notified the Circuit Court in Illinois that he had been transferred to the Federal Penitentiary at Terre Haute, Indiana. *Dye* was finally arraigned on March 3, 1975, "after having been brought into Illinois on a writ of habeas corpus ad prosequendum". When *Dye's* cases were called to trial on March 17, 1975, the State's Attorney moved to nolle prosse one indictment and indicated his readiness to proceed on the other. Counsel for *Dye* stated he was not prepared for trial on the second indictment and requested a continuance, "with *Dye* being present in court". After admonishing *Dye* in open court that a continuance would operate to waive his right to trial within 180 days provided by the Uniform Agreement on Detainers, the trial court granted the continuance and *Dye* was remanded "to the custody of the United States Marshals who had escorted *Dye* to and from court for every appearance and had required him to stay in the Springfield City jail while awaiting trial because the McLean County jail did not meet Federal standards". After the continuance was granted, *Dye* was taken back by the United States Marshals to the Federal prison in Terre Haute.

The distinction between *Dye* and petitioner is that (1) petitioner did not initiate proceedings under the Agreement, the State of Illinois did; (2) petitioner was not present in court when the order was promulgated directing his re-transfer to federal custody; (3) petitioner sought to vacate the order through the County Sheriff and one of his attorneys; and (4) petitioner stringently objected to return to federal custody without being tried on the charges in Illinois. Had the delay and corresponding transfer of petitioner's person been attributable to petitioner's request and

motion, then *Dye* would control. But where the petitioner stringently opposed transfer and was never afforded the opportunity to contest the order, the fault of such action is with the State of Illinois. The State of Illinois was thusly bound by the language of Article IV(e) of the Agreement, and was required to dismiss the indictments with prejudice. *United States* v. *Mauro,* 544 F. 2d 588 (2d Cir. 1976); *United States ex rel. Esola* v. *Groomes, supra;* cf. *United States* v. *Roberts,* 548 F. 2d 665 (6th Cir. 1977).

In reviewing the legislative and judicial history as to the Agreement in Illinois, it is advanced that the instant petition raises an issue of law of first impression for the courts of Illinois. That is, whether the mandatory dismissal provisions of Article IV(e) of the Agreement are subject to an exception predicated upon a continuance of trial for good cause shown, but where a defendant does not consent to a return to the sending jurisdiction.

The petitioner argues that the overwhelming weight of authority, consisting of both state and federal decisions, holds that there exists no exception to the mandatory dismissal provisions of Article IV(e) and that the indictments against the petitioner should be dismissed with prejudice as a result of his having been returned to the United States Penitentiary in Indiana without having been tried by Illinois. *United States* v. *Mauro, supra; United States* v. *Ford, supra; United States ex rel Esola* v. *Groomes, supra; United States* v. *Ricketson, supra; United States* v. *Sorrell, supra; United States* v. *Roberts, supra;* cf. *Ridgeway* v. *United States,* 558 F. 2d 357 (6th Cir. 1977); *United States* v. *Kenaan,* 557 F. 2d 912 (1st Cir. 1977); *Contra,* Meyer, *Effective Utilization of Criminal Detainer Procedures,* 61 Ia. L. Rev. 659 (1976); Dauber, *Reforming the Detainer System: A Case Study,* 7 Crim. L. Bull. 669 (1971); Note, *The Interstate Criminal Detainer and the Sixth Amendment,* 23 Ark. L. Rev. 634 (1970); Schindler, *Interjurisdictional Conflicts and the Right to a Speedy Trial,* 35 U. Cin. L. Rev. 179 (1966).

The *Dye* court acknowledged that "there is no authority in Illinois to guide us in reaching this conclusion," and based its result solely on the case of *People* v. *Bernstein,* 344 N.Y.S. 2d 786 (1973), while acknowledging a contrary result having been reached in *United States* v.

Mauro, 414 F. Supp. 358 (E.D.N.Y. 1976), *affirmed* at 544 F. 2d 588 (2nd Cir. 1976). The facts in *Dye* and *Bernstein* are distinguishable from petitioner's case as attorneys in both cases requested a continuance "with defendants being present" and further given the opportunity to contest any right as to return to the sending jurisdiction. It is significant to note that the *Bernstein* court's decision is based upon its conclusion that the defendant was brought from Connecticut to New York for arraignment and not for trial; for that Court interprets Article IV(e) of the Agreement to apply only when: (1) all motions on behalf of the defendant have been concluded; and (2) the defendant is prepared for trial and brought into the receiving state for that purpose. See, Section 580.20 et seq. Criminal Procedure Law, McKinneys Consolidated Laws of New York. It must, therefore, be presumed that had the transfer of the defendant in *Bernstein* from Connecticut to New York been for the purpose of trial, with all pre-trial motions having been adjudicated, his re-transfer to Connecticut would have effectuated the dismissal of his New York indictment, although a different result may have been reached in light of *United States* v. *Mauro, supra; United States* v. *Ford, supra.* For regardless of receiving states compliance with the time limitations (and as enlarged by continuance) of Article IV(c), "Article IV(e) requires that a prisoner not be returned to the custody of the sending state untried; if he is, the indictments must be dismissed with prejudice". Assuming *arguendo,* and even adopting the rationale of the *Dye* decision, any continuances granted at a defendant's request, would only determine whether Article IV(c) of the Agreement had been complied with. It would in no way affect the unequivocal dismissal language of Article IV(e) which is without exception.

The court in *United States ex rel. Esola* v. *Groomes, supra,* held that a claim by a prisoner in federal custody, arising out of a state statute adopting the Agreement, as it operates in conjunction with the Federal Agreement is a claim arising under "the laws of the United States" within the meaning of the federal habeas corpus statute (28 U.S.C. §§ 2241 (c)(5) et seq). Query, if the issue formulated by the instant petition is federal as well as state in nature, making ultimate federal review inevitable, should not federal case

law, all of which is inconsistent with the *Dye* case in the interpretation of Article IV(e), be controlling? The Court in *Esola, supra,* went on to say:

> "Finally, Article IV(e) provides that if the trial is not held prior to the prisoner's return to the sending state, then the 'indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.' The purpose of the Article IV provisions is to insure that interruptions of the sending jurisdiction's incarceration are minimized, and in exchange for the small added hardship placed on the prosecutor of the demanding state regarding time limits, a simplified procedure for obtaining the defendant's presence is made available". 520 F. 2d at 834.

Thusly, prevailing state and federal case law authority, coupled with statutory construction of Article IV(e), mandates that the indictments in the instant case should have been dismissed on motion in the Circuit Court, and that Prohibition to regain custody of the petitioner should have been granted, to effectuate the legislative construction of Article IV(e) of the Agreement.

QUESTION PRESENTED

2. Does equal protection of the laws and due process under the Fourteenth Amendment apply to enforce procedural and statutory compulsion of the Interstate Agreement on Detainers to dismiss the charges where a disposition has not been reached, although a continuance has been granted for good cause, but where a criminal defendant does not consent to a return to the sending jurisdiction?

In *Smith* v. *Hooey,* 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed. 2d 607 (1969), decided the year before federal enactment of the Agreement, this Court held that the constitutional right to a speedy trial was not suspended because the state did not have the power to compel the presence at trial of a defendant who was a prisoner in another jurisdiction. Thusly, although the Agreement was operational within some state jurisdictions, the federal government did not become a "member state" of the Agreement until 1970. The question which some jurisdictions have yet to resolve is when does equal protection of the laws under the Fourteenth Amendment of the Constitution effectuate the right to due process of law, where a state does not enforce the mandatory provi-

sions of a state statute? *United States ex rel. Esola* v. *Groomes, supra; United States* v. *Mauro, supra;* but cf. *Dickey* v. *Florida,* 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed. 2d 26 (1970).

In 1976, with indictments outstanding against the petitioner, the State's Attorney of Illinois, Sangamon County, initiated a demand for temporary custody under the Agreement for petitioner. Subsequently, on June 7, 1976, pursuant to the provisions of the Agreement, petitioner was produced for purposes of trial in the Circuit Court, Seventh Judicial Circuit, Sangamon County, State of Illinois. The State's Attorney was aware that he was required by statute to pursue prosecution in this matter, and that a disposition must be reached, before return of the petitioner to the sending jurisdiction. Article IV(e) of the Agreement. See, *United States* v. *Ford, supra; United States* v. *Scallion, supra; United States* v. *Mauro, supra.* Following a request of counsel predicated upon an unanticipated illness, the trial court, pursuant to Article IV(c), granted a continuance. The continuance granted under Article IV(c) of the Agreement, did not employ the duty of the trial court to vitiate the statutory language of Article IV(e) of the Agreement, by returning the petitioner to the sending jurisdiction. Rather, this action sought to deprive the petitioner of due process of law by foreclosing his right to controvert the action without being heard on the issue of return.

In reviewing legislative history of Article IV(e) of the Agreement, it is found that "it was the intent of members of the Agreement to effectuate the right of a defendant to dismissal of the indictment, information or complaint, where he was returned to the sending jurisdiction without being tried", which would preclude multiple incarcerations in various jurisdictions without enforceable remedy. *United States* v. *Mauro, supra.* A State cannot seek to obtain a gain from a statute when the State in fact violates both the provisions and intent of the Statute. The circumstances would have altered equitable relief had the petitioner consented in fact to a return to the sending jurisdiction, but where no such request had been made or consented to, constitutional protections of equal protection of the law to effectuate due process under the Fourteenth Amendment require at the minimum, that Article IV(e) of the Agreement be enforced, by a dismissal of the indictments. *United States ex rel. Esola* v. *Groomes, supra; United States* v. *Mauro, supra.* As this Court has held in *Smith* v. *Hooey, supra,* that the speedy trial clause of the Sixth Amendment requires that a State which has a charge pending against a defendant serving a sentence elsewhere make a good faith to bring such defendant to trial with a reasonable time, surely the Constitution demands no less than to require equal protection of the laws by forcing the States to adhere to Agreements entered into by legislative delegation. To do otherwise, would undermine the constitutional protections of the Fourteenth Amendment. Although the Agreement should be liberally construed so as to effectuate its purposes, it should not decry enforcement of a constitutionally protected area of equal protection of the laws.

CONCLUSION

For the reasons set forth above, the decision of the Supreme Court of Illinois in the instant case raises substantial questions of general importance in the administration of criminal justice, and it is, therefore, respectfully submitted that this Petition for Certiorari be granted.

Respectfully Submitted,

Clarence Neville
Petitioner pro se
Register No. 32106-138
United States Penitentiary
P.O. Box 33
Terre Haute, Indiana

Authorized by the Act of
July 7, 1955 to Administer
Oaths (18 U.S.C. 4004)

Clifton E. Floyd
Parole Officer

STATE OF INDIANA)
: ss. :**CERTIFICATE OF SERVICE**
COUNTY OF VIGO)

CLARENCE NEVILLE, being duly sworn, deposes and says:

That he is the petitioner in the within action; that he is over the age of twenty-one years; that he has upon this 31st —day of January, 1978, caused to be served upon the Respondent's herein, true copies of a Petition for Writ of Certiorari, by placing same in a properly addressed, postage pre-paid (registered Mail), wrapper, and depositing same in a depository under the care and control of the United States Postal Service located at the United States Penitentiary, Terre Haute, Indiana, for forwarding to:

Clerk of the Court
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Hon. Simon L. Friedman, Judge
Circuit Court, Seventh Judicial Circuit
Sangamon County Courthouse
County Building
Springfield, Illinois 62701

C. Joseph Cavanagh, Esquire
State's Attorney
Sangamon County Courthouse
County Building
Springfield, Illinois 62701

Clarence Neville
Clarence Neville

SUBSCRIBED and SWORN TO before me

this 31st day of January, 1978

Notary Public

Authorized by the Act of
July 7, 1955 to Administer
Oaths (18 U.S.C. 4004)

Clifton E. Floyd
Parole Officer

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-512

CLARENCE NEVILLE,

Petitioner,

v.

SIMON L. FRIEDMAN, JUDGE OF THE CIRCUIT COURT OF SANGAMON COUNTY, ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18, 1978.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 13th
day of December, 1977.

OPINION
SUPREME COURT
OF ILLINOIS
United States of America

State of Illinois ss.
Supreme Court

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and seventy-seven, within and for the State of Illinois.

Present: Daniel P. Ward, Chief Justice

Justice Robert C. Underwood — Justice Joseph H. Goldenhersh
Justice Howard C. Ryan — Justice William G. Clark
Justice Thomas J. Moran — Justice James A. Dooley

William J. Scott, Attorney General
Louie F. Dean, Marshal
Attest: Clell L. Woods, Clerk

Be it Remembered, that afterwards, to-wit, on the 20th day of September, 1977 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Clarence Neville,
Petitioner

No. 49345 vs.

The Honorable Simon L. Friedman, Judge of the Circuit Court of Sangamon County, etc., et al., etc., } Prohibition

Respondents

CLELL L. WOODS
Clerk of the Supreme Court
State of Illinois

Docket No. 49345—Agenda 21—May 1977.

CLARENCE NEVILLE, Petitioner, v. SIMON L. FRIEDMAN, JUDGE, *et al.*, Respondents.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

We granted petitioner, Clarence Neville, leave to file this original action for a writ of prohibition. His petition results from the Sangamon County circuit court's denial of his motion to dismiss several indictments there pending against him. He seeks permanent prohibition of a trial on these indictments and their dismissal with prejudice.

Neville was serving a 10-year sentence at the Federal penitentiary in Terre Haute, Indiana, when he was transferred to the Sangamon County jail in June 1976 pursuant to section 3-8-9(a) of the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1003-8-9)) for the purpose of trial on these indictments. This statute represents Illinois' adoption of the Uniform or Interstate Agreement on Detainers Act in force in the Federal system, the District of Columbia, and 44 States. Neville's trial was scheduled for October 25, 1976, when his privately retained counsel requested, on October 18, a continuance because of counsel's illness. The circuit court granted a continuance until January 1977, with a specific date to be set later. Shortly thereafter, the court, with no apparent objection by petitioner, entered an order directing his return to the Federal penitentiary in Terre Haute, the transfer apparently occurring on October 25. Subsequently, petitioner filed his motion to dismiss based on article IV(e) of section 3-8-9(a) of the Unified Code of Corrections, which provides:

> "If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." (Ill. Rev. Stat. 1975, ch. 38, par. 1003-8-9(a).)

This motion was denied, the court ruling that *People* v. *Dye* (1977), 45 Ill. App. 3d 465, *appeal allowed* (May 1977), No. 49413, was controlling on the issue. This action followed.

A single issue is presented: Does article IV(e) of section 3-8-9(a) of the Unified Code of Corrections require the dismissal of indictments pending against a defendant who, as a result of lengthy, indefinite trial continuance granted at his request, has been returned to the sending jurisdiction without objection on his behalf? We hold that it does not.

Article I of section 3-8-9(a) sets forth the purpose of the statute:

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures." (Ill. Rev. Stat. 1975, ch. 38, par. 1003-8-9(a).

Article IV(c) states:

> "[I]n respect of any proceeding made possible by this Article [*i.e.*, after a written request for temporary custody made by the prosecutor to a jurisdiction wherein the prisoner is incarcerated], trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

Article V(e) provides:

> "At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state."

Petitioner urges that article IV(e), which does not expressly acknowledge any exception to its requirement of dismissal where a defendant has been returned untried to the sending State, should be read literally. A cardinal rule of statutory construction is, however, that the intent and meaning of a statute are to be determined by looking to the

entire statute. Each provision should be construed in connection with every other provision and in light of the statute's general purposes. *(Huckaba* v. *Cox* (1958), 14 Ill. 2d 126, 131.) As set forth in article I, the Act is designed to encourage the expeditious and orderly disposition of untried charges against a prisoner in order to accomplish its basic purpose of reducing obstructions to programs of prisoner treatment and rehabilitation. The requirement of a trial within 120 days (art. IV(c)) is directly related to expeditious dispositions, and the requirement that the prisoner be returned to the sending State at the earliest practicable time (art. V(e)) clearly promotes the rehabilitative purpose. In this context discouraging the return of an untried prisoner to the sending State (art. IV(e)) provides an additional incentive to a speedy disposition.

Application of the statute to the facts here, however, keeping in mind the statutory objectives, leads to the conclusion that the motion to dismiss was properly denied. As a consequence of the trial court's concern for fairness to petitioner, his request for a continuance based upon his attorney's illness was allowed. This constituted good cause for a continuance under article IV(c), and the running of the 120-day period was thereby tolled. Petitioner suggests, however, that this continuance cannot properly be attributed to him because he was not present when it was requested or granted. This court has previously rejected this argument. *(People* v. *Siglar* (1971), 49 Ill. 2d 491, 496; *People* v. *Woods* (1963), 27 Ill. 2d 393, 395.) In addition, article IV(c) requies only the presence of the defendant or his counsel. Allowance of the continuance resulted in a delay of the trial by at least 2-1/2 months, and, at the time of petitioner's return to Indiana, it was not known when the trial would actually occur. It is noteworthy that, at the time petitioner requested the continuance, he had already been held in the Sangamon County jail for approximately four months. While this approaches the outer limits of time which the Agreement on Detainers anticipates a prisoner will spend in the receiving State under article IV, we believe the literal reading of article IV(e) urged upon us by petitioner is inimical to the fundamental purpose of the Act. County jails are designed and intended for short-term

incarceration of prisoners, and are neither equipped nor staffed for the type of rehabilitative and training programs found in prisons. It seems entirely clear to us that petitioner's continued detention in the Sangamon County jail for an additional period of 2-1/2 or more months would substantially interfere with the Federal prisoner-treatment and rehabilitation programs which were employed at Terre Haute. Such interference is not in the best interests of petitioner, for whose benefit the programs are designed, nor of a society interested in the rehabilitation of its offending members. By contrast, we can discern no useful purpose to be accomplished by holding petitioner in the Sangamon County jail during that period, and he does not argue that any exists.

While the issue we are deciding is a question of first impression in this court, others have spoken to it. In *People* v. *Dye* (1977), 45 Ill. App. 3d 465, *appeal allowed* (May 1977), No. 49413, the prisoner was sent from the Federal penitentiary in Terre Haute, Indiana, to Illinois for trial. A continuance was granted because defense counsel was not ready for trial, and United States marshals returned the prisoner to Terre Haute. That court held a defendant cannot take advantage of the trial court's fairness in granting his request for a continuance and then obtain a dismissal because of his return to the sending jurisdiction. In *People* v. *Bernstein* (Dutchess County Ct. 1973), 74 Misc. 2d 714, 344 N.Y.S. 2d 786, the prisoner was sent from the Federal correctional institution in Danbury, Connecticut, to New York for arraignment, and thereafter returned to Danbury pending the filing and resolution of pretrial motions by his counsel. The court held him not entitled to dismissal because he was returned untried to the sending State since he had not been ready for trial in the receiving State.

Petitioner relies upon several cases which we find substantially less persuasive than he. His contention is perhaps best illustrated by *dictum* in *United States* v. *Ricketson* (7th Cir. 1974), 498 F.2d 367, 373, *cert. denied* (1974), 419 U.S. 965, 42 L. Ed. 2d 180, 95 S. Ct. 227: "[T]here are no exceptions to the requirement that defendant not be returned *** untried." That court went on to hold, however, that the Agreement on Detainers Act was inapplicable, and we do not find the quoted observation per-

suasive, particularly since the case did not involve continuances granted at the defendant's request, a factor we regard as highly significant in our case. Its absence serves to distinguish all but one of the remaining cases cited by petitioner. *(See United States ex rel. Esola* v. *Groomes* (3d Cir. 1975), 520 F.2d 830; *United States* v. *Sorrell* (E.D. Pa. 1976), 413 F. Supp. 138; and *Commonwealth* v. *Merlo* (1976), -- -- -- Pa. Super. -- -- --, 364 A.2d 391). The remaining case, *United States* v. *Mauro* (2d Cir. 1976), 544 F.2d 588, was basically concerned with two issues not before us: whether a *habeas corpus ad prosequendum* is the equivalent of a detainer under the statute and whether the United States adopted the statute only as a sending State and not as a receiving State. The court referred to the waiver argument only in a footnote (544 F.2d 588, 591 n.3), and we do not find it persuasive.

In our judgment nothing in the Agreement on Detainers Act requires the dismissal of charges against a defendant as to whom Illinois was prepared to go to trial, but who was, without *objection* by him, returned to the sending jurisdiction because of lengthy trial delay occasioned by him. We believe this return under those circumstances implements the underlying rehabilitative purpose of the Act, and that denial of his subsequent motion to dismiss the indictments was proper.

The petition for a writ of prohibition is accordingly denied.

Writ denied.

IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT
OF ILLINOIS
SPRINGFIELD, SANGAMON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	CRIMINAL
-v-	)	
	)	NO. 74-CF-266
CLARENCE NEVILLE,	)	
	)	
Defendant.	)	

MEMORANDUM OF OPINION

This Court is of the opinion that the decision of the Appellate Court, Fourth District, in the case of *People V. Richard Lee Dye* filed February 3, 1977 is controlling in the instant case.

For this reason, the Court has this day made the following docket entry:

> "Motion of defendant to dismiss is denied. Cause to be set for trial. State's Attorney is directed to prepare an order and present same to Court for entry. Cause continued for written order."

Respectfully submitted,

SIMON L. FRIEDMAN
CIRCUIT JUDGE

Enter: 2/23/77

ATTACHMENT "A"

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT OF ILLINOIS, SANGAMON COUNTY, SPRINGFIELD, ILLINOIS GENERAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF,
-vs-
CLARENCE NEVILLE,
DEFENDANT.
NO. 74-CF-266

MOTION FOR CONTINUANCE

Now comes Gerald Alch, Esquire, having been admitted pro hac vice to represent the defendant in the above-captioned cause, and respectfully moves this Honorable Court for a continuance of the instant trial presently scheduled for October 25, 1976.

The basis for this request is Counsel's unexpected illness which has resulted in his being advised by his Doctor not to engage in any trial activity for at least the period of one month. The illness involves a low blood count, resulting in iron-deficiency anemia. The manifestations of this condition are extreme weakness, attacks of severe perspiration and dizziness. Aside from taking medication designed to build up Counsel's blood count, complete rest for approximately the next four weeks is the sole treatment.

Counsel wishes to assure this Honorable Court that in no way is this request made for dilatory purposes, for this development was completely unforeseen. The defendant is presently incarcerated as a result of a prior conviction.

A letter from Dr. G. A. Capodilupo, 327 Hanover Street, Boston, Massachusetts, is annexed hereto.

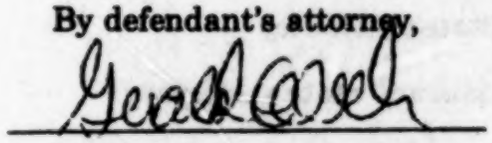
WHEREFORE, the defendant prays as follows:

1. That because of the unanticipated circumstances hereinabove set forth, the trial date of October 25, 1976 be adjourned.

2. That the trial of the instant matter be re-set for December, 1976.

3. For such other and further relief as this court may deem just and proper in the premises.

By defendant's attorney,

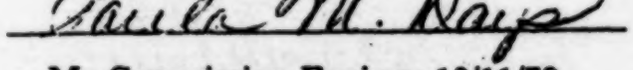


GERALD ALCH, ESQUIRE
Penthouse
One Center Plaza
Boston, Massachusetts 02108
(617) 742-5566

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. OCTOBER 13, 1976

Then personally appeared the above-named Gerald Alch, Esquire, and acknowledged the contents of the foregoing Motion for Continuance to be true before me.

Paula M. Days
NOTARY PUBLIC



My Commission Expires: 10/11/79

CERTIFICATE OF SERVICE

I, James R. Potter, Esquire, 1227 South 7th Street, Springfield, Illinois, hereby certify that I have this day served copies of the instant Motion for Continuance upon:

Jeanne E. Scott, Assistant State's Attorney

and Mr. Walter Farrand, Assistant State's Attorney
County Building
Springfield, Illinois

by mailing copies of same, postage prepaid, this day of October, 1976.

JAMES R. POTTER, ESQUIRE
1227 South 7th Street
Springfield, Illinois 62705

OFFICE TEL. CAPITOL 7-5946 RES. TEL. FAIRVIEW 7-1795

G. A. CAPODILUPO, M. D.
327 HANOVER STREET
BOSTON, MASS.

DATE Oct. 12 1976

To Whom It May Concern
This is to certify that Gerald A. Ich is at the present time under my care and treatment for a marked secondary Anemia with etiology unknown. I have advised that he stay in Bed at least a Complete rest for at least a period of one month and during this time arrangements are to be made for him to have a Complet Workup, i.e. X Rays. Sigmoidoscopy Lab work. etc.

Thankyou
G A Capodilupo M.D.

Supreme Court, U. S.
FILED
MAY 30 1978
MICHAEL RODAK, JR., CLERK

NO. 77-1137

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1977

CLARENCE NEVILLE,

Petitioner,

V.

THE HONORABLE SIMON L. FRIEDMAN, Judge of the Circuit Court of Sangamon County, Seventh Judicial Circuit of Illinois, and C. JOSEPH CAVANAGH, State's Attorney for Sangamon County, Springfield, Illinois,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

C. JOSEPH CAVANAGH
State's Attorney
of Sangamon County, Illinois

J. WILLIAM ROBERTS
First Assistant State's Attorney
of Sangamon County, Illinois
404 County Building
Springfield, Illinois 62701

Attorneys for Respondent

NO. 77-1137

IN THE SUPREME COURT OF THE UNITED STATES
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Springfield, Illinois 62701

Attorneys for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1977

NO. 77-1137

CLARENCE NEVILLE,

Petitioner,

V.

THE HONORABLE SIMON L. FRIEDMAN, Judge of the Circuit Court of Sangamon County, 7th Judicial Circuit of Illinois, and C. JOSEPH CAVANAGH, State's Attorney for Sangamon County, Springfield, Illinois,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 67 Ill. 2d 488, 367 N.E.2d 1341.

QUESTION PRESENTED

Does the Interstate Agreement on Detainers Act require the dismissal of indictments pending against a defendant who, as a result of lengthy, indefinite trial continuance granted at his request, has been returned to the sending jurisdiction without objection on his behalf?

STATUTES INVOLVED

The Interstate Agreement on Detainers Act, 18 U.S.C. Appendix Section 2, Article IV(e) provides:

> "If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Illinois Revised Statutes, 1973, ch. 38, par. 1003-8-9(a) provides:

> "If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

STATEMENT OF THE CASE

Respondent, C. Joseph Cavanagh, accepts Petitioner's statement of the case with the following additional facts:

The Petitioner was returned to Sangamon County on June 4, 1976 pursuant to the Interstate Agreement on Detainers Act to stand trial during the week of June 7. 1976. Subpoenas were issued to witnesses on behalf of The People and the prosecution was prepared to commence trial the week of June 7. On June 9, 1976, the Petitioner advised the court that he had fired his retained counsel and wished time to retain a new attorney. The court granted the Petitioner's request and ordered that the case be set for trial on August 2, 1976, with the proviso that no further continuances would be granted.

On July 15, 1976, James Potter of Springfield, Illinois, and Gerald Alch of Boston, Massachusetts were granted leave to enter their appearance as counsel for Petitioner. Defense counsel then moved to continue the trial of the case to October 25, 1976. This motion was allowed by the court and trial of the case was continued to October 25, 1976.

Subpoenas were issued to witnesses on behalf of The People and the prosecution was prepared to go to trial on October 25, 1976. On October 18, 1976, defense counsel moved to continue the trial from October 25, 1976 because of the illness of one of petitioner's attorneys. The court allowed the motion for a continuance and set an indefinite trial date in the month of January, 1977, with a specific trial date to be set thereafter.

Nowhere does the record reflect that the Petitioner objected to either the continuances granted him or his return to the federal penitentiary at Terre Haute.

ARGUMENT

On the strength of a literal interpretation of Chapter 38, Section 1003-8-9(a), Illinois Revised Statutes, Illinois' adoption of the Interstate Agreement on Detainers Act (Agreement), Petitioner urges the permanent prohibition of trial on indictments pending against him. Petitioner claims that under the Agreement he is entitled to dismissal of the charges against him in Sangamon County because he was returned without trial to the sending jurisdiction. Petitioner's argument overlooks the purpose of the Agreement which is expressed in Article I thereof. The gist of Article I is that the Agreement is designed to encourage the expeditious and orderly disposition of untried charges against a prisoner in order to accomplish its basic purpose of reducing obstructions to programs of prisoner treatment and rehabilitation.

The record in this matter discloses that the State was prepared to go to trial within three (3) days of the date on which Petitioner was brought to Illinois from the federal penitentiary at Terre Haute, Indiana pursuant to the Agreement. Each of the continuances thereafter was attributable to Neville. *People* v. *Siglar* (1971), 49 Ill. 2d 491, 496, *People* v. *Woods* (1963), 27 Ill. 2d 393, 395. It is clear that the statutory objectives of the Agreement were being frustrated by retaining Neville in a county jail neither designed nor equipped and staffed for rehabilitation of prisoners.

Petitioner relies upon a number of cases in support of his position that return to the sending jurisdiction without trial mandates dismissal of the indictments against him[1].

Each of these cases is factually distinguishable from this case in which Petitioner asks this court to grant certiorari. The Supreme Court of Illinois in considering *United States* v. *Ricketson*, (7th Cir. 1974), 498 F. 2d 367, 373, cert. denied (1974), 419 U.S. 965, 42 L.Ed. 2d 180, 95 S.Ct. 227, *United States ex rel. Esola* v. *Groomes*, (3d Cir. 1975), 520 F. 2d 830, and *United States* v. *Sorrell*, (E.D. Pa. 1976), 413 F. Supp. 138, found that the absence of a continuance granted at defendant's request served to distinguish those cases from this case. *People* v. *Neville*, 67 Ill. 2d 488, 367 N.E. 2d 1341 (1977). The Illinois court was not asked to specifically address *Ridgeway* v. *United States*, 558 F. 2d 357 (6th Cir. 1977) and *United States* v. *Ford*, 550 F. 2d 732 (2d Cir. 1977). The central issue of each of those cases was whether a federal writ of *habeas corpus ad prosequendum* was to be treated as a "detainer" under the Agreement; that was also a tangential issue mentioned in *dictum* in *United States* v. *Roberts*, 548 F. 2d 665 (6th Cir. 1977).

In discussing *United States* v. *Mauro*, (2d Cir. 1976), 544 F. 2d 588, the Illinois Supreme Court determined in *People* v. *Neville, supra*, that the question of whether a federal writ of *habeas corpus ad prosequendum* is the equivalent of a detainer under the Agreement was not relevant to the matter being considered. It is respectfully submitted that the same holds true to the other cases cited by Petitioner which speak to the *habeas corpus* issue.

Respondent suggests that Petitioner has presented no persuasive authority to support his position

1 *United States ex rel. Esola v. Groomes*, 520 F. 2d 830 (3d Cir. 1975); *United States* v. *Sorrell*, 413 F. Supp. 138 (E.D. Pa. 1976); *United States* v. *Ricketson*, 498 F. 2d 367, (7th Cir. 1974), cert. denied, 419 U.S. 965, 95 S.Ct. 227, 42 L.Ed. 2d 180 (1974); *United States* v. *Ford*, 550 F. 2d 732 (2d Cir. 1977); *United States* v. *Mauro*, 544 F. 2d 588 (2d Cir. 1976); *United States* v. *Roberts*, 548 F. 2d 665 (6th Cir. 1977); *Ridgeway* v. *United States*, 558 F. 2d 357 (6th Cir. 1977).

that the Agreement mandates dismissal given the circumstances herein. It is further suggested that his return to the sending jurisdiction under the given factual circumstances implemented the underlying rehabilitative purpose of the Agreement and that denial of the writ of prohibition was proper.

CONCLUSION

For these reasons, Respondent urges this Honorable Court to deny the petition.

Respectfully Submitted,

_____

C. Joseph Cavanagh
State's Attorney
Sangamon County, Illinois

By: _____

J. William Roberts
First Assistant State's Attorney